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Frank S. Simone
Government Affairs Director

Suite 1000
1120 20th Street, N.W.
Washington, DC 20036
202 457-2321
FAX 202 457-2545
EMAIL fsimone@att.com

June 6, 2001

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, S. W. – Room TWB-204
Washington, D. C. 20554

98-147

Re: *Ex parte*, CC Docket No. 01-88/Application of SBC Communications Inc. Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region InterLATA Services in Missouri; CC Docket No. 98-147, Deployment of Wireline Services Offering Advanced Telecommunications Capability; CC Docket No. 96-98, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996

Dear Ms. Salas:

On Tuesday, June 5, 2001, Dina Mack, Teresa Marrero, Robert Quinn and the undersigned of AT&T met with the following members of the Common Carrier Bureau: Dorothy Attwood, Glenn Reynolds, Brent Olsen, William Dever and Chris Libertelli. The purpose of the meeting was to review the attached written *ex parte* submissions filed in the above-captioned proceedings. We discussed AT&T's May 31, 2001 and June 1, 2001 submissions in the section 271 proceeding addressing SBC's compliance with its advanced services resale obligations and its obligation to establish cost-based rates in accordance with the Commission's TELRIC methodology. In addition, we discussed AT&T's April 20, 2001 submission in the Collocation proceeding addressing whether the Commission may require incumbent local exchange carriers ("LECs") to permit competitive LECs to collocate cross-connects pursuant to 47 U.S.C. §§ 251(c)(6) and 224.

Two copies of this Notice are being submitted to the Secretary of the FCC in accordance with Section 1.1206 of the Commission's rules.

Sincerely,

cc: D. Attwood
W. Dever
C. Libertelli
B. Olson
G. Reynolds

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WRITER'S DIRECT NUMBER
(202) 736-8164

WRITER'S E-MAIL ADDRESS
ryoung@sidley.com

May 31, 2001

Ex Parte

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W. – Room TW-A325
Washington, D.C. 20554

Re: CC Docket No. 01-88, In the Matter of Application by SBC Communications, Inc., *et al.*, for Provision of In-Region InterLATA Services in Missouri

Dear Ms. Salas:

This letter, which is submitted at Staff's request, responds to a number of arguments made by SWBT for the first time in its reply comments regarding its compliance with its obligations with respect to advanced services. Specifically, the letter responds to SWBT's arguments that it has complied with its obligations: (1) to offer for resale at a wholesale discount the advanced telecommunications services that it offers at retail; (2) to furnish line sharing on fiber-fed DSL configured loops; and (3) to provide competing carriers with the ability to engage in line splitting arrangements.

I. SWBT HAS NOT COMPLIED WITH THE REQUIREMENTS OF SECTION 251(c) AND THE RECENT *ASCENT* DECISION WITH RESPECT TO THE PROVISION OF ADVANCED SERVICES.

Despite AT&T's evidence to the contrary, SWBT, in its Reply Comments, continues to insist that it has no obligation to offer DSL Transport for resale at a wholesale discount, because: (1) SWBT itself does not offer DSL Transport as a stand-alone service at retail to residential and business end-users; and (2) SWBT's affiliate, SBC Advanced Solutions, Inc. ("ASI"), is simply "a wholesale provider of DSL Transport service to Internet service

providers and a retail provider only to certain grandfathered services and specific contract arrangements with large, business customers."[1] These contentions are totally contrary to the facts.

At the time it filed its application, SWBT's web site offered DSL Transport to the public not only as part of a "package" of DSL Transport with Internet access, but also as a stand-alone service that it described as "DSL Transport only – *Order just the DSL feature* and use your current Internet Service Provider (ISP) or an ISP from our ISP Partners Program." AT&T Opening Comments at 5, 34; Finney Decl., ¶ 12 & Att. 1 at 3 (emphasis added). Following the filing of AT&T's comments, SWBT *deleted* that part of its web-page with respect to residential customers. Nevertheless, statements on SWBT's web-page continue to make clear that SWBT still holds itself out as a provider of DSL Transport in Missouri to residential, as well as business, customers – including SWBT's description of its unaffiliated "ISP partners" as "authorized DSL sales representatives for Southwestern Bell DSL Transport services." AT&T Reply Comments at 28-30 & Att. 2 at 1; AT&T Opening Comments, Finney Decl., ¶ 12 n.11 & Att. 2 at 1. Thus, SWBT's offering of DSL Transport clearly meets the Commission's definition of "retail transactions" – "direct sales of a product or service to the ultimate consumer for her own personal use or consumption."[2] Because the offering is not limited to ISPs, DSL Transport is a service subject to the wholesale discount requirements of Section 251(c)(4). *Second Advanced Services Order*, ¶¶ 3-4.

SWBT makes little effort to reconcile the obvious inconsistency between the offering of DSL Transport on its web-page to residential and business end-users and its denial that it is offering the service to the public at retail, because it cannot do so. Nor does SWBT mention, much less explain, its recent deletion of that offering from its retail list of residential services from its web-page, which was obviously done in reaction to the evidence submitted in AT&T's opening comments.[3] SWBT's deletion of this offering constitutes a discontinuance of a common carrier service without filing an application for Commission approval (which would have given CLECs an opportunity to comment) and, therefore, without having received prior Commission approval. That practice is clearly unlawful and contrary to the Commission's recent public admonition that common carriers are required to follow the procedures set forth in Part 63

[1] *See* Reply Brief of Southwestern Bell In Support of InterLATA Relief in Missouri, filed May 16, 2001 ("SWBT Reply Br.") at ii-iii, 31-38; Joint Reply Affidavit of Lincoln E. Brown and John S. Habeeb ("Brown/Habeeb Reply Aff."), ¶¶ 6-11.

[2] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Second Report and Order, 14 FCC Rcd. 19237 (1999), ¶ 13 (*"Second Advanced Services Order"*).

[3] *See* AT&T Reply Comments at 28 & Att. 1 at 3.

of its rules, and to obtain Commission authorization, "before discontinuing, reducing, or impairing domestic common carrier services."[4]

Rather than address or explain these matters, SWBT obfuscates the issue of its retail offering of stand-alone DSL service with irrelevant arguments. For example, although SWBT accuses AT&T of "twisting the language of the SWBT web-site to its own ends" (Brown/Habeeb Reply Aff., ¶ 6), SWBT never explains why the "DSL Transport only" offer has appeared on its web-page if, as SWBT contends, "ASI simply does not sell DSL Transport services to the ultimate end user consumers," (SWBT Reply Br. at 38), or that DSL Transport is "a product that SWBT does not offer" and "SWBT has no DSL service offerings." SWBT Reply Br. at 35-36 & n.31.

SWBT suggests that the "DSL Transport only" entry on its web page is simply part of "marketing and sales services" that it is performing pursuant to an arrangement with ASI permitted under the *SBC/Ameritech Merger Order*. *See* SWBT Reply Br. at 35-36; Brown/Habeeb Reply Aff., ¶¶ 6, 8. This explanation, however, does not remove SWBT's offering from the requirements of Section 251(c)(4). Under the *ASCENT* decision, SWBT and ASI are to be viewed as one entity for purposes of Section 251(c), and "the Commission may not permit an ILEC to avoid § 251(c) obligations by setting up a wholly-owned affiliate to provide those services."[5] Thus, it makes no difference whether the actual party offering the service at retail is SWBT or ASI.

SWBT also implies that the "DSL Transport only" offering on its web-page is consistent with ASI's alleged status as a wholesaler, because the web-page "makes clear that in order for the end-user to use the 'DSL Transport only' service, he/she must use an ISP," which alone can combine that service with the ISP's Internet Access Service and sell that "package" to the public. *See* Brown/Habeeb Reply Aff. ¶ 8; *see also* SWBT Reply Br. at 34. SWBT's response, however, merely begs the question. While SWBT states that its DSL Transport offering must always be combined with Internet service to be taken by the consumer, the Commission was fully aware in the *Second Advanced Services Order* that ILECs can market DSL services *either* directly to residential and business end-users *or* to ISPs who package it as part of a high-speed Internet service. *Second Advanced Services Order*, ¶ 6. The *Order* made clear that an ILEC's obligations under Section 251(c)(4) depends on *which* of these methods it is employing and, therefore, on the persons to whom it is offering the service. To the extent that

[4] See DA 01-1173, *Reminder To Common Carriers Regarding Discontinuance of Domestic Service Under Section 214 of the Communications Act* (released May 8, 2001).

[5] *See Association of Communications Enterprises v. FCC*, 235 F.3d 662, 668 (D.C. Cir. 2001) (*"ASCENT"*). Moreover, although SWBT's Reply Br. and supporting Brown/Habeeb Reply Affidavit repeatedly refer to the purported distinctions between SWBT, ASI, and SBIS, AT&T's evidence – which SWBT does not dispute – showed that end-users are *not* advised of any distinctions when they call SWBT concerning the purchase of DSL Transport for combination with Internet service provided by an unaffiliated ISP. *See* Garroway Decl., ¶¶ 2-6 (Att. 3 to Finney Decl.).

the ILEC offers DSL services to end-users at retail, it must offer those services for resale at a wholesale discount. Only to the extent that the ILEC is offering the DSL service directly and exclusively to ISPs as an input component for a service that the ISP markets to the public is the service exempt from the wholesale discount requirement. *Id.*, ¶¶ 3-22.[6] In this case, because SWBT offers DSL as a stand-alone service to both residential and business end-users on its web-page, that service must be provided at resale at the wholesale discount.

SWBT's retail offering of DSL as a stand-alone service to the public is further confirmed by its practice of "split-billing" – sending a separate bill directly to DSL/Internet customers of some independent ISPs for the DSL Transport, while the customers pay the ISP a separate charge for the Internet service. *See* AT&T Comments at 34 & Finney Decl., ¶ 13; SWBT Reply Br. at 37-38; Brown/Habeeb Reply Aff., ¶ 9 & n.7. SWBT admits that in such an arrangement, "ASI collects DSL Transport charges, including installation, monthly recurring charges, and termination charges from end-users." Brown/Habeeb Reply Aff., ¶ 9; *see also* SWBT Reply Br. at 37-38.[7] SWBT simply attempts to dismiss the split-billing arrangement as a "*de minimis* billing arrangement" which it agrees to provide in order "to assist ISPs who need it, particularly small ISPs with limited resources." SWBT Reply Br. at 37-38; Brown/Habeeb Reply Aff., ¶ 9. SWBT, however, cites no authority – whether in the *Second Advanced Services Order* or otherwise – for the proposition that there is a "*de minimis*" exception to the discount obligations of Section 251(c)(4). In any event, far from being the *de minimis* arrangement that SWBT describes, split-billing is an arrangement that SWBT offers voluntarily to *all* ISPs. *Id.*

Furthermore (although SWBT refrains from addressing the issue), if a customer in a split-billing arrangement failed to pay SWBT for the DSL Transport, SWBT – not the ISP – surely would have the responsibility, and the right, to collect the applicable charges or to terminate the Service for nonpayment. SWBT's assertion that "ASI has no contractual relationship with the end-users in Missouri that are customers of ISPs who elect split-billing" is flatly wrong. *See* Brown/Habeeb Reply Aff., ¶ 10(j). In Missouri, as in other states,[8] contracts

[6] *See also Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd. 3953 (1999), ¶ 393 (*"New York 271 Order"*) (*Second Advanced Services Order* "found that, although DSL services designed for and sold to residential and business end-users are subject to the discounted resale obligations of section 251(c)(4), where the incumbent LEC offers DSL services as an input component to ISPs who combine the DSL service with their own Internet service, the discount obligations of section 251(c)(4) do not apply").

[7] Although SWBT asserts that the billing and collection is performed by ASI, rather than by SWBT itself, that distinction is irrelevant under the *ASCENT* decision. In any event, SWBT's contention is totally contrary to prior representations made by SWBT itself, and by one of the independent ISPs with which SWBT has a split-billing arrangement, that *SWBT* performs these functions. Finney Decl., ¶ 12 & Att. 3 (Garroway Decl., ¶¶ 5-7) (describing statement by SWBT that customer "would receive a bill from Southwestern Bell and a separate bill from the ISP" in a split-billing arrangement," and attaching the web page of Brick Network, which states that "You purchase the ADSL service from Southwestern Bell" and describes the monthly charges that the customer will pay to SWBT for the ADSL).

[8] *See, e.g., Restatement (Second) Contracts*, § 19; E. A. Farnsworth, *Farnsworth on Contracts*, § 3.10 (1990).

may be "implied-in-fact" from the conduct of the parties even absent the creation of a "formal" contract by spoken or written words.[9] Thus, "one who holds out goods may be taken to be offering them for sale" and "[o]ne who begins to perform services for another in expectation of payment may be taken to be offering them for sale."[10] The critical issue is whether a "reasonable person" would understand that the one party intended to undertake an obligation or performance in expectation of payment (or return performance) by the other.[11]

Here, the conduct of SWBT and consumers purchasing its services clearly gives rise to an "implied-in-fact" contract. SWBT holds itself out to the public as providing stand-alone DSL Transport service. A reasonable person viewing the listing of "DSL Transport only – Order just the DSL feature" on SWBT's web page would understand SWBT to be offering DSL Transport as a stand-alone service to residential and business end-users for a fee. Even with the deletion of this entry by SWBT, a reasonable person would interpret SWBT's statement on its web-page that independent ISPs "act as authorized DSL sales representatives for Southwestern Bell DSL Transport services" would understand SWBT to be offering DSL Transport for a fee to end-users. And, in many instances, customers write a check directly to SWBT for that service under the split-billing arrangements. *See also* AT&T Reply Comments at 29 & Att. 3; Finney Decl. Att. 3 (Garroway Decl., ¶¶ 5-6). Thus, a "reasonable person" in these circumstances would understand that SWBT was offering to sell customers DSL Transport service and that those customers paying SWBT for that service have accepted that offer.[12] Indeed, the failure to imply a contract in a split-billing arrangement would create anomalous results: SWBT would have no recourse against customers that refused to pay for DSL service, while customers would have no recourse against SWBT if SWBT decided to stop providing DSL service or experienced network problems that impaired the quality of the DSL Transport. Furthermore, because the alleged purpose of the split-billing arrangement is to relieve the ISPs of the costs of billing their customers for DSL service, it would be illogical for the ISPs to assume responsibility for collection of unpaid DSL Transport charges. *See* SWBT Reply Br. at 37-38.

SWBT's recitation of various "indicia of a wholesale relationship" to show that the split-billing option is "merely a wholesale offering" is irrelevant. *See* Brown/Habeeb Reply Aff., ¶¶ 9-10; SWBT Reply Br. at 36-37. In the *Second Advanced Services Order*, the

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[9] *See, e.g., Dailing v. Hall*, 1 S.W.3d 490, 491 (Mo.App. 1999); *Westerhold v. Mullenix Corp.*, 777 S.W.2d 257, 263 (Mo.App. 1999); *Kosher Zion Sausage Co. v. Roodman's Inc.*, 442 S.W.2d 543 (Mo.App. 1969); *Bennett v. Adams*, 362 S.W.2d 277, 280-81 & nn.3, 4 (Springfield Ct. of App. 1962); *Roper v. Clanton*, 258 S.W.2d 283, 288 (Springfield Ct. of App. 1953).

[10] *Farnsworth on Contracts, supra*, § 3.10. *See also Kohn v. Cohn*, 567 S.W.2d 441, 446 (Mo.App. 1978); *Kosher Zion Sausage*, 442 S.W.2d 543; *Bennett*, 362 S.W.2d at 280-81 & nn. 3, 4.

[11] *Farnsworth on Contracts, supra*, § 3.10.

[12] *See Kosher Zion Sausage*, 442 S.W.2d 543 (finding implied contract based on course of dealings between distributor and producer); *Roper*, 258 S.W.2d at 288 (finding implied contract between real estate owners and tenant based on course of performance).

Commission made clear that the critical issue, for purposes of Section 251(c)(4), is whether the ILEC is offering and selling DSL services at retail directly to residential and business end-users.[13] In any event, SWBT's "indicia" do not survive scrutiny. SWBT (or ASI) performs a number of the functions performed by the ISP purchasers of "bulk DSL services" cited in the *Second Advanced Services Order* – including marketing, ordering, and billing. *See Second Advanced Services Order*, ¶ 15. As previously stated, SWBT performs the marketing functions for DSL Transport, offering it as a stand-alone service on its web-page to the general public. As SWBT acknowledges, SWBT takes orders for DSL Transport directly from end-users and then, after the order is completed, passes them on to the ISPs designated by the customers. Brown/Habeeb Reply Aff., ¶ 10(a)-(c). SWBT separately bills the end-user for the DSL Transport whenever the ISP so desires. Brown/Habeeb Reply Aff., ¶¶ 9, 10(e). And, despite SWBT's suggestion to the contrary, the evidence shows that the price for the DSL Transport service is set by SWBT itself.[14] SWBT also does not assert that maintenance and repair of the DSL Transport is solely the responsibility of the ISP, but contends only that end-users are "encouraged" to call their ISPs when they experience trouble with "their Internet service." *Id.*, ¶ 10(g).[15]

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[13] *See Second Advanced Services Order*, ¶ 9 ("The category of services subject to the provisions of section 251(c)(4) is determined, therefore, by whether those services are telecommunications services that an incumbent LEC provides (1) at retail and (2) to subscribers who are not telecommunications carriers"); *id.*, ¶ 15 ("the DSL services that incumbents are offering to Internet Service Providers specifically contemplate that the Internet Service Provider will be the entity providing to the ultimate end-user many services typically associated with retail sales, thus *reinforcing our conclusion* that the bulk DSL services are not retail services offered to the ultimate end-users") (emphasis added).

[14] SWBT's contentions that that its sales representatives direct a customer who wishes to use an unaffiliated ISP as its Internet access provider "to contact the specified ISP for Internet pricing information, including prices for the DSL Transport service," Brown/Habeeb Reply Aff., ¶ 10(a), and that "the ISP determines what price the end-user will pay for DSL Transport Service" are both contrary to fact and highly misleading. *See* Brown/Habeeb Reply Aff., ¶ 10(d). AT&T's evidence showed that *SWBT* determines the charges for DSL Transport, and communicates those charges directly to the end user without requiring the end user to contact the ISP. Specifically, AT&T's testimony showed – and SWBT does not dispute – that in telephone conversations with AT&T, SWBT quoted a charge of $39 per month for the DSL under a year-long commitment, $59 per month under a monthly arrangement, and $129 for "premium" DSL service. *See* Finney Decl., ¶ 13 & Att. 3 (Garroway Decl., ¶ 6). If, as SWBT contends, the charges are determined through SWBT's negotiations with individual ISPs, SWBT could not have unequivocally quoted such blanket charges to AT&T. SWBT's own testimony shows that ISPs have virtually no voice in the determination of the rate for DSL Transport, even when the ISP bills the end-user for *both* the DSL Transport and Internet service. *See* Brown/Habeeb Reply Aff., ¶ 10(d) n.11 (stating that, whether or not ISP executes a separate DSL services agreement with ASI, the ISP must agree to receive a price at or below $39.00 per month for the DSL Transport service).

[15] *See also* SWBT Reply Br. at 37. SWBT would certainly perform any repairs when the trouble reported by the customer is due to a problem with the DSL Transport, as SWBT effectively admits. *See* Brown/Habeeb Reply Aff., ¶ 10(g) (stating that unaffiliated ISPs "can submit trouble reports to ASI on end-user lines even when the DSL Transport is split-billed").

Finally, the Commission should reject SWBT's proposed solution of discontinuing its option of split-billing if such an arrangement is found to constitute a retail service offering. *See* Brown/Habeeb Reply Decl., ¶ 11. As a procedural matter, SWBT's eleventh-hour threat would not cure SWBT's violation of Section 251(c)(4) because, under the Commission's complete-when-filed rule, an application must be judged according to the circumstances that existed at the time of filing and post-comment factual changes may not be considered. *See* AT&T Reply Comments at 30-31 n.29. But in any case, SWBT's abandonment of split-billing would be only a half-measure. It would not address the core problem, which is that SWBT is holding itself out to the public as a provider of DSL Transport service, yet is denying CLECs the ability to do the same through resale, at a wholesale discount. So long as SWBT (or ASI) continues to market a DSL transport service directly to end-users, it must make a wholesale DSL transport service available to CLECs. To hold otherwise would be to indulge SWBT in its plainly anticompetitive strategy of offering a DSL transport service to its customers while denying CLECs the resale opportunity that Congress clearly intended them to have. See 47 U.S.C. § 251(c)(4); *Second Advanced Services Order*, ¶¶ 1, 18, 20.

II. SWBT'S REPLY COMMENTS CONFIRM THAT SWBT HAS NOT COMPLIED WITH ITS OBLIGATION TO PROVIDE UNBUNDLED ACCESS TO LINE SHARING OVER FIBER-FED LOOPS AT THE CENTRAL OFFICE.

In its reply comments, SWBT mischaracterizes the *Line Sharing Reconsideration Order* to mean that it may limit unbundled access to line sharing at the central office to all-copper loops. *See* SWBT Reply Br. at 29. It may not. The *Order* clarifies that an ILEC must provide line sharing over fiber facilities as well as copper, and requires that an ILEC must provide access to line sharing at either the central office or the remote terminal, at the CLEC's request. *Line Sharing Reconsideration Order*, ¶ 10. It does not permit SWBT, or any other ILEC, to dictate a technology-specific limitation over the manner in which a CLEC may access any loop at the central office for line sharing purposes. Specifically, the *Order* (¶ 11) indicates that a CLEC must have the option to access fiber-fed loops at either the remote terminal or the central office, "not [the location] that the incumbent chooses as a result of network upgrades entirely under its own control." Thus, as explained in AT&T's comments, the Commission cannot find that SWBT is in compliance with checklist items (ii) and (iv).

SWBT's position that the *Line Sharing Reconsideration Order* does not obligate it to provide unbundled access to line sharing over fiber-fed loops at the central office is completely inconsistent with two fundamental legal principles that have guided the Commission's definition of the loop as an unbundled network element. First, the Commission recognized that the loop provides essential transmission functionality needed for a customer to send and receive telecommunications signals between his location and a centralized point in the serving ILEC central office where it is technically feasible for a CLEC to connect to the loop

facility.[16] Second, the Commission has always recognized that the local loop, as all network elements, is defined by its functionality and is not limited to particular services or technologies.[17] Indeed, the *Line Sharing Reconsideration Order* (¶ 10) clearly reiterates that principle, noting that the definition of the loop itself as a "transmission facility" was "specifically intended to ensure that this definition was technology-neutral."

SWBT's fiber-fed loops, which are being deployed to provide its customers with access to both voice and data services, are not immune from application of these fundamental principles. Presumably, SWBT would not, and could not, argue that it may deny a competitor seeking to provide voice services over its Project Pronto facilities from gaining unbundled access to fiber-fed loops at the central office. Indeed, the Commission's past rulemakings make it abundantly clear that the loop unbundling obligations extend to fiber-fed, DLC-equipped, loops.[18] Pursuant to the Commission's technology- and service-neutrality principles, SWBT's obligation to provide a competitor with unbundled access to fiber-fed loops at the central office must also necessarily extend to the telecommunications signals they need to provide advanced services via line sharing.

SWBT claims that it complies with "all of its line sharing obligations" because it permits CLECs to access the high-frequency portion of the copper portion of the loop in two ways: (1) by provisioning all-copper loops, where available; and (2) by permitting a CLEC to collocate a DSLAM at or near the central office and utilize dark fiber or fiber feeder subloops. *See* SWBT Reply Br. at 28-29. SWBT is wrong on both counts. First, SWBT's "all-copper" loop proposal is not an adequate substitute to line sharing over fiber-fed loops. As AT&T demonstrated in its opening comments, SWBT's obligation to provide nondiscriminatory access to loop facilities cannot conceivably be met when SWBT or its affiliates have access to fiber-fed, DLC-equipped loops (and very short runs of copper), while nonaffiliates are constrained to use only the aged, all-copper plant that SWBT finds inadequate for its own purposes.

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[16] *See* 47 C.F.R. § 51.319(a)(1) ("[t]he local loop network element is defined as a *transmission facility* between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop demarcation point at an end-user customer premises") (emphasis added).

[17] *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* Third Report and Order, 15 FCC Rcd. 3696 (1999) *("UNE Remand Order")*, ¶ 167 ("[o]ur intention is to ensure that the loop definition will *apply to new as well as current technologies*, and to ensure that competitors will continue to be able to access loops as an unbundled network element as long as access is required") (emphasis added); *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd. 15499 (1996),, ¶ 292, *aff'd in part and vacated in party sub nom. Iowa Utils. Bd. v. FCC,* 120 F.3d 753 (8th Cir. 1997), *aff'd in part and rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999) *("Local Competition Order")* ("section 251(c)(3) requires incumbent LECs to provide requesting carriers with all of the functionalities of a particular element, so that requesting carriers can provide *any telecommunications services* that can be offered by means of the element") (emphasis added).

[18] *See, e.g., UNE Remand Order,* ¶ 175; *Local Competition Order,* ¶ 383.

Second, SWBT cannot require a CLEC to collocate a DSLAM at the remote terminal in order to satisfy its obligation to provide line sharing over fiber-fed loops. As noted above, the *Line Sharing Reconsideration Order* (¶ 11) recognized that a competitor may not be required to collocate a DSLAM at the incumbent's remote terminal in order to gain access to line sharing over fiber-fed subloops. The mere fact that subloop unbundling -- which is an option available to the CLECs -- may be available in some limited circumstances has no impact on the ILEC's obligation to provide line sharing functionality over the "entire loop, even where the incumbent has deployed fiber in the loop." *See Line Sharing Reconsideration Order*, ¶ 10.

In a similar argument, SWBT maintains that so long as it provides one or both of these alternatives, it is not required to unbundle certain remote terminal electronics, which SWBT considers a form of "packet switching" functionality, pursuant to conditions set forth in the *UNE Remand Order*. SWBT Reply Br. at 30-31. SWBT's argument is fatally flawed for several reasons. First, as AT&T has explained in great detail in several proceedings, the electronics associated with SWBT's upgraded loop architecture provide core transmission functionality (multiplexing, etc.) that is not, and cannot, be considered packet switching.[19] No competitor -- even one that has provisioned its own packet switch in the central office -- can provide voice or data services -- unless it has access to its customers' telecommunication signals. Such signals are delivered over the "entire loop" element, which necessarily includes all of SWBT's facilities between the customer's premise and its central office. Thus, SWBT's position is solely designed to frustrate a competitor's access to the unbundled loop for line sharing (or line splitting) purposes when SWBT deploys next-generation loop architecture. In doing so, SWBT is using its upgraded loop architecture -- which is entirely under its own control -- to dictate the access point for line sharing over fiber-fed loops at the remote terminal. SWBT's actions are flatly prohibited by Paragraph 11 of the *Line Sharing Reconsideration Order*.

Moreover, even if the electronics associated with SWBT's upgraded loop architecture were considered, for the moment, subject to the Commission's rules regarding "packet switching," the severe limitations associated with SWBT's all-copper loops and RT-based collocation alternatives mean that, even under the *UNE Remand Order* exception, unbundling of these electronics will be required in virtually all circumstances where SWBT has deployed fiber-fed, DLC-equipped loops. As explained in AT&T's comments and, as noted above, the mere availability of spare copper does not discharge SWBT's unbundling obligation, because competitors will not be able to use those facilities to offer "the same level of quality for advanced services" as that offered by the ILEC (or its data affiliate). *See UNE Remand Order*, ¶ 313. Likewise, the physical, technical, and economic limitations associated with SWBT's

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[19] *See, e.g., Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 2nd FNPRM in CC Docket No. 98-147, 5th FNPRM in CC Docket No. 96-98, AT&T Comments at 44-47 and Declaration of Joseph P. Riolo, ¶¶ 44-47 (attachment to AT&T's Comments), AT&T Reply, at 46-49 (filed Nov. 14, 2000); *see also* 3rd FNPRM in CC Docket No. 98-147, 5th FNPRM in CC Docket No. 96-98, AT&T Comments at 11-14 (filed Feb. 27, 2001).

vague RT-based collocation alternative make clear that competitors will rarely, if ever, be able to collocate its DSLAM in SWBT remote terminal on a nondiscriminatory basis.[20]

In all events, SWBT's interpretation of its obligations under the *Line Sharing Reconsideration Order* must be rejected. If adopted, SWBT's interpretation would introduce an unlawful service- and technology-based distinction between the unbundling of underlying transmission functionality associated with voice and advanced telecommunications services. Neither the Act nor the Commission's prior rulings make any distinction between the transmission functionality used to provide advanced telecommunications services (primarily DSL) and voice services between the customer's premises and the central office. Both are "telecommunications services" and thus both are expressly covered by the unbundling obligations of Section 251.

Indeed, it is critical to the future of meaningful residential competition in Missouri that the Commission reject SWBT's position that it need not provide unbundled access to fiber-fed loops at the central office for line sharing purposes. For far too long, both SBC and SWBT have been permitted to deprive consumers of competitive choice for advanced telecommunications through their general intransigence and foot-dragging regarding their line sharing obligations. At the time AT&T first brought line sharing issues to the Commission's attention, SBC had roughly 100,000 DSL customers.[21] Now SBC has approximately ten times as many.[22] Moreover, the pace of SBC's entry grows monthly, with SBC likely to be self-

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[20] The Commission itself recently recognized this fact in the *Line Sharing Reconsideration Order*, stating that as fiber deployment by ILECs is increasing, "collocation by competitive LECs at remote terminals is likely to be costly, time consuming and often unavailable." *Line Sharing Reconsideration Order*, ¶ 13.

[21] *See* SBC Press Release, "*SBC Partners with Concentric for DSL Service*" (Nov. 15, 1999) (noting that as of November 1999, a month before the release of the Commission's *Line Sharing Order*, SBC was "[a]lready the nation's top provider of DSL service with sales to more than 100,000 subscribers").

[22] The dominance that SBC holds in its DSL markets is apparent by its ability to halt indefinitely deployment of DSL facilities in states that determine that SBC's unbundling obligations extend to its Project Pronto facilities, such as Illinois. *See* Letter from Terry S. Harvill, Commissioner, Illinois Commerce Commission, to The Honorable J. Dennis Hastert, Speaker of the House, at 1-2 (AT&T Opening Comments, Att. 6) ("Harvill Letter"). In the Harvill Letter, Commissioner Harvill correctly describes the power that SBC has over broadband services in Illinois, and consequently broadband consumers: "Ameritech Illinois controls the market so completely that it can determine if more than a million customers in Illinois will have access to broadband services." *Id.* at 2. Now SBC (through SWBT) is holding the threat of halting deployment of Project Pronto over the heads of the Kansas State Corporation Commission. *See General Investigation to Determine Conditions, Terms and Rates for Digital Subscriber Line Unbundled Network Elements, Loop Conditioning, and Line-Sharing*, Docket No. 01-GIMT-032-GIT, State Corporation Commission of the State of Kansas, Additional Brief of Southwestern Bell Telephone Company, at 2 (filed May 21, 2001) ("SBC has withdrawn its Project Pronto deployment in Illinois as a result of an unbundling order in that state. SWBT wishes to avoid the same protracted regulatory proceedings, and potential cessation of Project Pronto deployment in the state of Kansas"). *See also id.*, Reply of Southwestern Bell To the Responses of Covad Communications Company and Sprint Corporation to Southwestern Bell Telephone Company's Motion To File Additional Brief and Allowing Other Parties To File Responses Thereto, at 3 (filed April 30, 2001) (stating that SWBT's proposed "compromise" will "eliminate the potential for the halting of Project Pronto in Kansas as a result

(continued. . .)

provisioning over 3,500 orders per business day by the end of this year, with a national base by then of over 1.5 million customers.[23] In contrast, CLECs have no present ability to access line sharing over fiber-fed loops on a nondiscriminatory basis. If SBC can continue to prevent CLECs from line sharing over the fiber facilities that will soon predominate in its local network, CLECs' ability to compete against SBC (or its affiliates') voice and advanced services will be seriously impaired.

Accordingly, SWBT cannot satisfy the checklist requirement for providing access to loops on non-discriminatory terms and conditions.[24]

III. SWBT HAS MISSTATED THE SCOPE OF ITS OBLIGATION TO PROVIDE CLECs WITH THE ABILITY TO ENGAGE IN LINE SPLITTING ARRANGEMENTS.

SWBT's representations concerning its development of a single-order process for CLECs to add xDSL service to UNE-P voice customers are highly misleading. *See* SWBT Reply Br. at 62-63; Chapman Reply Aff., ¶¶ 10-12. SWBT incorrectly asserts that "nothing more is required under the *Line Sharing Reconsideration Order*" than for SWBT to begin work on developing a single-order process when a CLEC first requests it. SWBT Reply Br. at 62-63. The *Line Sharing Reconsideration Order* not only held that incumbent LECs are "*required* to make all network modifications to facilitate line splitting, including providing nondiscriminatory access" for "ordering," but specifically clarified that such access included a single-order process. *Line Sharing Reconsideration Order*, ¶ 20-21 (emphasis added). Thus, the Order did not give SWBT unfettered discretion to decide for itself when to make such a process available.[25]

(continued. . .)
of an unbundling order"). SBC's message to these state regulators is clear: "Play our way, or we will not play at all."

[23] *See* SBC Investor Briefing, *Strong Growth in Data, Wireless and Long Distance Highlights SBC's First-Quarter Results*, at 4-5 (AT&T Reply Comments, Att. 5) (noting that SBC "[e]xpanded its DSL in-service subscriber base to 954,000" as of the end of the first quarter 2001, and that "daily net gain in subscribers" is expected to be in the "3,500-4,000 range").

[24] For similar reasons, the Commission must also clarify immediately the ILECs' unbundling and line sharing (as well as line splitting) obligations in circumstances where the ILEC upgrades its loops.

[25] Moreover, contrary to SWBT's assertion, the Commission has not held that "there is no obligation" for ILECs to provide splitters under any circumstances." Chapman Reply Aff., ¶ 13. In the *SBC Texas Order* that SWBT cites, the Commission stated that it intended to give "prompt and thorough consideration" to the CLECs' request for imposition of such a requirement in its reconsideration of the *UNE Remand Order*. *See Application by SBC Communications Inc., et al. Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, 15 FCC Rcd. 18354 (2000), ¶ 328 (*"SBC Texas Order"*); *see also Line Sharing Reconsideration Order*, ¶ 25 (indicating that Commission is committed to resolving splitter ownership issues expeditiously).

Indeed, in light of AT&T's experience to date in trying to obtain a single-order process for line splitting, it is particularly important that the Commission *not* provide SBC with a blank check to determine when to comply with its line splitting obligations. Although SWBT asserts that it "began work on developing these process improvements when CLECs first requested it," that is false. SWBT Reply Br. at 62. AT&T first requested implementation of a single-order process during a meeting with SWBT on February 1, 2001, and asked that the process be implemented in the September/October timeframe to support AT&T's planned offer of voice and advanced services to AT&T's UNE platform customers in SWBT's region.[26] Instead of committing to meet this date and beginning work on implementation, SWBT equivocated. It initially stated that it could not promise a single-order process before December 2001, then said that it would delay implementation until after March 2002, and finally said, over two months later, that it would meet an October 20, 2001 implementation date for SWBT states only.[27] Thus, left to its own devices, SWBT delayed providing a commitment for a single-order process to AT&T for several months. Because CLECs' ability to provide DSL services is so essential to the development of local competition, the Commission should make clear that significant delay in providing a single-order process that results in a failure to meet CLECs' market entry needs would be a checklist violation.[28]

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[26] Although AT&T first requested implementation of the single-order process in February 2001, it has discussed – and raised objections to – SWBT's proposed "interim" process (described below) for a much longer period. AT&T, for example, described the deficiencies in the "interim" process in testimony that it filed last June with the Texas PUC. *See* Direct Testimony of Steven E. Turner at 19-21 & n.19, filed June 15, 2000 on behalf of AT&T, *et al.*, in TPUC Docket No. 22315, *Petition of Southwestern Bell Telephone Company for Arbitration With AT&T Communications of Texas, L.P., TCG Dallas, and Teleport Communications, Inc., Pursuant To Section 252(B)(1) of the Federal Telecommunications Act of 1996.*

[27] SBC, however, has not agreed to implement the single-order process in its Pacific Bell or Ameritech regions by that date, nor has it proposed an alternative date.

[28] The inadequacy of SWBT's interim process for line splitting compounds the problems associated with delay of implementation of the single-order process. SWBT's interim process requires three LSRs, is poorly documented, and by SWBT's own admission, creates serious risk of service disruption. *See, e.g.*, Attachment 1 hereto (SBC's official documentation for the interim process, provided to AT&T at a California workshop on April 12); Chapman Reply Aff., ¶ 12 (stating that SWBT has "committed to manage" the separate LSRs involved in the interim process "to ensure service disruption is limited to that experienced when adding line sharing to an existing POTS line"); Transcript of proceedings held April 4, 2001, before California PUC in CPUC Docket Nos. R. 93-04-003., *et al*, at 12454-12460 (testimony of Sarah DeYoung, AT&T, and Carol Chapman, SBC); Direct Testimony of Steven E. Turner, *supra*, at 19-21 & n.19. Thus, SWBT's claim that no CLEC has used its interim process for ordering line splitting (Chapman Reply Aff., ¶12) is highly misleading.

Respectfully submitted,

Richard E. Young

Attachments

cc: G. Remondino
M. Carey
B. Olson
U. Onyeije
T. Navin

ATTACHMENT 1

LINE SPLITTING

General

Line splitting is the shared use of an unbundled loop for the provision of voice and data services. CLECs have the ability to engage in line splitting today under SBC's current offerings. SBC permits CLECs to engage in line splitting using SBC UNEs in full compliance with FCC rules.

SBC supports line splitting where a CLEC purchases separate elements using existing processes found on the CLEC web site and combines them with their own (or a partner CLEC's) splitter in a collocation arrangement.

Scenarios

Existing UNE-P customer migrating to a line splitting arrangement, CLEC would place the following orders:

- **Disconnect of existing UNE-P**
- **New connect for xDSL capable loop and loop to collocation cross-connect**
- **New connect for switch port (includes unbundled local switching) and port to collocation cross-connect**

New xDSL capable loop and switch port, CLEC would place the following orders:

- **New connect for xDSL capable loop to collocation cross-connect**
- **New connect for switch port (includes unbundled local switching) and port to collocation cross-connect**

The CLEC can pre-wire the splitter so that the voice service will be established immediately when the xDSL capable loop and unbundled switch port are terminated to the CLEC's collocation arrangement. The data provider will also transmit its data service through the splitter enabling both the voice and data to coexist on the shared facility.

SBC currently has flow through for line splitting when the CLEC is requesting a brand new service arrangement (no reuse of facility from an existing service). SBC, as suggested by the *Line Sharing Reconsideration Order*, is currently meeting with interested CLECs to develop improved order processes for situations where a CLEC wishes to engage in line splitting reusing facilities previously used as part of a UNE-P arrangement or line shared arrangement. As a result of these meetings, SBC is currently working to develop a single LSR process to facilitate these types of requests.

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ORIGINAL

WRITER'S DIRECT NUMBER
(202) 736-8000

June 1, 2001

Ex Parte Presentation

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Application of Southwestern Bell for Provision of In-Region, InterLATA Services in Missouri, CC Docket No. 01-88*

Dear Ms. Salas:

This *ex parte letter*, which is filed at the Commission Staff's request, addresses certain pricing arguments raised by Southwestern Bell ("SWBT") for the first time in its May 16, 2001 reply comments. As detailed below, SWBT's responses to the many serious violations of Commission pricing rules and basic forward-looking costing principles identified by commenters amount to little more than platitudes and unsupported assurances that answers can be found in cost models that SWBT refuses even to make available for review. What little evidentiary support SWBT does provide in support of its extravagant claims of TELRIC compliance – in particular, the reply declarations of Barbara Smith and Tim Morrissey – only confirms that SWBT's Missouri rates are not remotely cost-based.

As SWBT concedes, its Missouri rates are, in many cases, the highest in its five state region, notwithstanding that costs are, in many cases, *lower* in Missouri. *See* SWBT Reply at 3. SWBT disagrees with some specifics of AT&T's relative rate/cost comparisons, but SWBT's alternative approach yields the same conclusion: the enormous disparities between SWBT's Missouri rates and its rates in other SWBT states cannot be explained by cost differences. For example, SWBT's zone-specific analysis, like AT&T's study-area analysis, shows that SWBT's Missouri loop rates exceed those in Kansas and Texas by a large margin and that those rate differences are not a product of cost differences.[1] Loop rate/cost comparisons to

[1] SWBT's analysis shows unexplained rate differences between Missouri and Kansas in rural, suburban and urban zones of 25%, 36% and 14%, respectively. *See* Morrissey Reply Decl. ¶ 7 (computed using the rate/cost discrepancies identified in this paragraph). For Texas, SWBT's analysis generates unexplained rate differences of 7%, 13% and -5% for rural, suburban and urban zones respectively. *See id.*

Oklahoma and Arkansas tell the same story. *See* Lieberman Decl., Table 2 (showing unexplained rate differences between Missouri and Oklahoma (15%) and Arkansas (35%)). SWBT provides no alternative Oklahoma or Kansas loop comparisons, and it provides no rate/cost analyses at all with respect to switch usage or other elements.[2] SWBT also does not deny that its non-recurring charges ("NRCs") in Missouri greatly exceed its NRCs in other states. And SWBT declines to provide any rate/cost comparison of the UNE-Platform between Missouri and any other SWBT state. *Cf.* Lieberman Reply Decl., Tables 1 & 2 (showing that Missouri's UNE-platform rates for Missouri greatly exceed those in Arkansas even though Missouri costs are lower than those in Arkansas).[3]

Recognizing that its Missouri rates cannot survive a relative rate/cost comparison with any state in which SWBT has previously sought and obtained section 271 authority, SWBT urges the Commission either to ignore such comparisons altogether or to endorse a "mix and match" approach in which large rate/cost disparities relative to another state can be ignored if SWBT can, for each disputed rate element, point to another state – if necessary, a different state for *each* element – where the rate/cost disparity is less stark. The Commission has rejected the former, *see Mass. 271 Order*, CC Docket No. 01-9, ¶ 22 (April 16, 2001) ("the USF cost model provides a reasonable basis for comparing cost differences between states"). The Commission plainly should reject the latter. Any such shell game approach to UNE rate/cost comparisons that established as "benchmarks" only the *highest* approved rate for each individual element would be entirely arbitrary, would result in an ever expanding range of "reasonableness," and could not

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discrepancies identified in this paragraph). For Texas, SWBT's analysis generates unexplained rate differences of 7%, 13% and -5% for rural, suburban and urban zones respectively. *See id.*

[2] SWBT points out that its Missouri rates are lower than the Synthesis Model estimates of Missouri costs. *See* Morrissey Reply Decl ¶ 9. But the Commission held in SWBT's last section 271 proceeding that it will not consider *direct* comparisons of a state's rates to the Synthesis Model cost estimate for that state, but only *relative* rate/cost comparisons. *See, e.g., Kansas/Oklahoma 271 Order*, CC Docket No. 00-217, ¶ 84 (January 22, 2001) ("the USF cost model should not be relied upon to set rates for UNEs, [however] it accurately reflects the relative cost differences among states"). And SWBT's arguments why relative Synthesis Model comparisons should nonetheless be disregarded are baseless. Although the Synthesis Model does include "retail" costs, *see* Morrissey ¶ 5, it assumes the *same* retail costs in each state, thus removing retail rates simply reduces cost estimates by the same amount in each state. SWBT's claim that the Synthesis model "does not capture study area-specific costs," *id*, is simply false. The Commission's model employs vast amounts of area-specific input data, including customer location and terrain data. *See Inputs Order* ¶¶ 36-62. Moreover, NECA data – which certainly reflects all study area-specific costs – reveals even *greater* unexplained Missouri loop rate/cost disparities than the Synthesis Model comparisons that SWBT challenges. *See* Lieberman Decl. ¶ 23.

[3] SWBT urges the Commission to look instead to New York (and Massachusetts, where Verizon claims it offers New York-equivalent rates) as the Missouri analog. *See, e.g.*, Morrissey ¶ 10. But even if that were appropriate the New York PSC's ALJ recently recommended that Verizon be ordered to decrease its excessive New York rates to levels that will make the New York UNE platform cost 21% *less* than the Missouri UNE platform. *See Proceeding on the Motion of the Commission to Examine New York Telephone Company's Rates For Unbundled Network Elements*, Recommended Decision on Module 3 Issues, Case 98-C-1357 (May 16, 2001) ("*New York Re-Examination Decision*"). The Massachusetts Commission is likewise considering requests that Verizon be ordered to reduce its rates in that state.

possibly survive judicial review.[4] Moreover, any such approach would create perverse incentives that would greatly increase the scope and frequency of rate litigation in section 271 proceedings. Even in a state where UNE rate levels, were, on the whole, reasonably close to TELRIC levels, for example, competing carriers would be encouraged – indeed, required – to litigate the individual rate elements that strayed furthest from TELRIC for fear that those rate elements would later be used to justify rates for those elements in another state in which UNE rates were, on the whole, excessive (and that other excessive rate elements in the latter state would then be justified by "outlier" rate elements from still other states). For their part, the BOCs would be encouraged to game the system by selectively reducing particular rate elements (and leaving others at inflated levels) in their early section 271 applications, so that later applications could benefit from a mix and match of inflated rates for *all* key elements.

The potential for BOCs to game the system in this way is especially great now that the Commission has approved section 271 applications in a number of states. The pool of UNE rates currently available to BOCs to justify any newly proposed UNE rates is already quite large. And as the number of section 271 approved states increases, the ability of BOC's to justify higher and higher UNE rates would increase as well. Further, the Commission should not allow BOCs to justify newly proposed rates by comparing them to rates in states that were themselves justified by such a comparison. For example, the Commission approved SWBT's Oklahoma UNE loop rates because they fell within some "reasonable range" above those in Texas. To now assess Missouri's rates based on Oklahoma's rates would increase the benchmark around which the Commission established its "range of reasonableness," even though no new information is available to support such an increase.[5] The result of that analysis would be an impermissible widening of that "range of reasonableness."[6] Thus, if the Commission is to rely upon relative comparisons, it should look at only a single benchmark state where the

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[4] *See, e.g., Public Service Company of Indiana v. ICC*, 249 F.2d 753 (1984) (rejecting as arbitrary an ICC finding that a railroad was inefficient based only upon a comparison of that railroad to the nation's most profitable railroad, a selective comparison that the Court noted "suggests manipulation"); *Illinois Telecommunications Ass'n v. FCC*, 123 F.3d 693, 694 (1997) (rejecting as arbitrary the FCC's decision to assume that originating 800 calls would be same as originating other types of payphone calls, especially since the record shows that other comparisons may be more appropriate); *Tennessee Gas Pipeline v. FERC*, 926 F.2d 1206, 1209 (1991) (rejecting as arbitrary the agency's decision to justify a single rate from some "zone of reasonableness," noting that such analysis is "a standardless exercise of Commission discretion resting on no more than an assertion of expertise").

[5] In this regard, SWBT's proposal to mix-and-match UNE rates comparisons for individual UNEs across states violates basic statistics principles. In particular, that analysis introduces systematic bias into the analysis by impermissibly increasing the benchmark around which the "reasonable range" is determined based solely on the fact that the higher benchmark was found to be within a reasonable range of the original benchmark. *See* Robert S. Pindyck & Daniel L. Rubinfeld, *Economic Models & Economic Forecasts*, McGraw Hill, Inc. (3d ed. 1991) (pointing out that such systematic bias that could result in incorrect conclusions regarding any ranges about that biased average); *see also* Thomas H. Wonnacott & Ronald J. Wannacott, *Introductory Statistics for Business and Economics*, John Wiley & Sons (4th ed. 1990) (illustrating the problems associated with biased estimators).

[6] In its *Kansas/Oklahoma Order* (¶ 79 n.238), for example, the Commission found that Oklahoma's transport rates which exceeded those in Texas by 37% were within a "reasonable range."

methodology used to develop recurring UNE rates was clearly TELRIC-compatible. The only appropriate state for analyzing Missouri's UNE rates is Kansas. *See* AT&T Reply at 11; DOJ Eval. 12 & nn. 42, 43. The Kansas Commission's application of TELRIC methodology is the only one that has been accepted by all affected parties as implementing TELRIC for recurring rates; even SWBT has effectively endorsed the Kansas recurring UNE rates by recommending that the Arkansas Commission borrow them for adoption in Arkansas.[7]

In short, SWBT's Missouri UNE rates exceed its rates in each of its other states by wide margins and this rate inflation does not reflect legitimate cost differences.[8] In these circumstances, both the Act and the Commission's prior section 271 decisions demand that the Commission conduct its own independent review and that SWBT can meet its Checklist Item 2 burden only with detailed and verifiable cost evidence that demonstrates that its Missouri rates comply with the Commission's TELRIC rules. SWBT plainly has not met that burden.

AT&T, Worldcom, DOJ and others have documented numerous serious TELRIC violations that explain why SWBT's Missouri rates exceed its rates in other states. In its reply comments, SWBT confirms many of these violations, but contends that they are "minor" or that the resulting cost inflation is offset by cost study mistakes that SWBT claims it made in the other direction. SWBT denies the existence of other TELRIC violations, claiming that AT&T, the DOJ, the Missouri PSC Staff and others have all "misunderstood" SWBT's cost studies. *See, e.g.*, SWBT Reply at 14. These arguments must be rejected out of hand, because SWBT's bald assertions about its cost studies are entirely unsupported. There is no dispute that SWBT has refused to place its full Missouri cost studies in the record. Yet, throughout its reply comments, SWBT claims that details of those models would clear up "misunderstandings" about the operation of the models and confirm that they toe the TELRIC line. SWBT recognizes, of course, that the Commission and commenters have little ability to refute (or verify) these claims without access to the cost studies, and thus SWBT is free to say almost anything about them. SWBT now asks the Commission to play the fool and endorse this "trust me" approach to checklist compliance. The Commission has already properly rejected that approach as a general matter, *see, e.g., Kansas/Oklahoma 271 Order* ¶ 10 (a finding of checklist compliance is possible only when "the factual record supports the conclusion"), and SWBT's recent track record makes clear that it would be a particularly poor candidate for an honor system approach.[9]

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[7] Kansas non-recurring rates, however, are not remotely cost based. *See Sprint Communications Co. et al. v. FCC, No. 01-1076 et al.*, Brief of Appellants, at 30-36 (D.C. Cir. filed April 30, 2001).

[8] SWBT also claims that AT&T's margin analysis is flawed because it understates the amount of revenue available to CLECs for Metropolitan Calling Area ("MCA") rates. *See* Sparks Reply Decl. ¶ 30. But adjusting the MCA so that it is averaged only over those lines where it is available would not change the fact that margins in Missouri's rural and suburban areas are negative. Moreover, redistributing MCA revenues would not affect the overall average margin and consequently would not change the fact that statewide UNE-platform margins are negative. In contrast, SWBT's comparison of its Missouri UNE-platform rates to those in New York and Massachusetts is flawed because those comparisons are based on old rates. *See* n.3, *supra*.

[9] *See, e.g.*, Ex Parte Letter from Geoffrey Klineberg, Kellogg, Huber, Hansen, Todd & Evans, to Magalie Roman Salas, Federal Communications Commission (April 13, 2001); Ex Parte Letter from John D. Lee, Comptel, to

Because the section 271 process so obviously depends upon full, timely and extended electronic access to the cost studies that a BOC claims demonstrate its compliance with the cost-based rate requirement, SWBT contends in the alternative that it has provided commenters with "sufficient" access.[10] AT&T and others have previously documented the patent inadequacy of the few Missouri spreadsheets that SWBT belatedly filed in this proceeding. *See* AT&T Reply at 23-25; MCI Reply at 4-5. SWBT notes that AT&T and others were provided with greater access to SWBT's Missouri studies in 1996-97 during the Missouri rate proceedings, Kern Reply Decl. ¶¶ 4-7, but fails to note that the permitted review was only of *hard copies* of the cost studies – on SWBT's premises where only limited notes could be taken – and, in the case of key replacement studies, was limited to *the evening before* the hearings at which AT&T cost witnesses were called to testify. Alternatively, SWBT claims, commenters can refer back to their 1996-97 electronic review of SWBT's *Texas* cost studies, which SWBT claims are the same as the Missouri cost studies. *See* Smith Decl. ¶¶ 8-10. Without access to the Missouri studies, there is, of course, no way to verify this claim. Moreover, as SWBT repeatedly emphasizes elsewhere in its reply comments, cost models require the use of state-specific inputs, samples and studies. SWBT's LPVST model (used to compute UNE loop rates), for example, relies on SWBT's Missouri Loop Sample Survey, SWBT's Missouri Broadgauge Cost Study, SWBT's CAPCOST Model, SWBT's Missouri Maintenance and Other Cost Factors, none of which have been submitted in this proceeding in electronic form (and most of which have not been provided in *any* form). In any event, commenters would be precluded by SWBT's strict protective order in the Texas or other state proceedings from using SWBT data, models, or access to SWBT mainframe programs gained in other states in any way to restate or revise SWBT's Missouri UNE studies.[11] In short, SWBT has utterly failed to meet its Checklist Item 2 burden, and it cannot be permitted to shift that burden to commenters.

Magalie Roman Salas, Federal Communications Commission (May 21, 2001) ("this is not the first time SBC has had difficulty with candor to the FCC"); Order On Review, *SBC Communications Inc., Apparent Liability For Forfeiture*, File No. EB-00-IH-0432, NAL/Acct. No. 200132080011 (May 29, 2001) (fining SBC $88,000 because SBC "use[d] misleading statistics and . . . comparisons . . . [and has] significantly overstated the accuracy of its findings"); Kenneth Hoexter, *SBC Ignores Rules, Pays 4th Fine*, Merrill Lynch Global Securities Research, Apr. 13, 2001 (noting that SBC has paid $23 million in fines for violations of Commission Orders and "prefer[s] to pay fines as a part of business, compared [to] . . . open[ing] the markets to local competition"); *Ex Parte Letter* from Richard Young to Magalie Roman Salas, Secretary, at 5-8 (May 24, 2001) (demonstrating that SWBT misrepresented the procedures it has undertaken to fix its LMOS systems).

[10] SBC's cost studies are a complex grouping of independent but interrelated studies and processes that necessarily have to be modified independently and in sequence in order to determine changes in ultimate output. For example, the local switching study requires the use of the SCIS model, the CAPCOST model, the "Cost Factors Binder" (which includes a distinct modeling of numerous cost factors such as maintenance factors and support asset factors) and the ACES model. In addition, outputs from one model must be manually transferred to the next model, sometimes after additional manipulation of the outputs on independent spreadsheets.

[11] The only Texas studies in this record are paper copies that SWBT submitted only days ago. Those studies include two separate SWBT computations of local switch usage costs – one from January 1997 and a second from November 1997. The studies do *not*, however, include any computations of SWBT's UNE loop cost, nor do they show how SWBT's annual cost factors were developed. For these reasons, the data submitted by SWBT are

But even on the limited evidentiary record SWBT has chosen to establish, it is clear that the TELRIC violations commenters have identified do exist and have substantially inflated SWBT's Missouri rates.

A. Generic TELRIC Violations That Inflate All UNE Rates.

Unlawful Reproduction Cost Assumptions. SWBT's reply comments confirm beyond doubt that SWBT's Missouri UNE rates reflect impermissible reproduction cost assumptions that violate the efficient replacement cost approach demanded by the Commission's rules. *See* 47 C.F.R. § 51.505(b)(1). SWBT now concedes, for example, that its loop rates do not reflect the cable sizes and runs that an efficient, cost-minimizing competitor would deploy, but instead simply reprice SWBT's embedded 1996 cable inventory: "All of the cable sizes and their corresponding lengths from the company inventory of cables are used in the calculation of the average pair foot investment for the total cable including feeder and distribution." Smith Reply Aff. at ¶ 43. *See also id.* at ¶ 41 ("SBC keeps records of the types and amounts of cable placed in its network. This inventory, used with the current 'Broadgauge' costs for cable, was used to develop the average cost per pair foot for feeder and distribution"); AT&T Comments at 13-16; AT&T Reply Comments 11. As the Commission has recently explained to the Supreme Court, that is flatly inconsistent with the TELRIC rules. *See* Brief of the FCC, *Verizon Commun., Inc. v. FCC*, at 6-7, *cert. granted*, 121 S.Ct. 877-89 (2001) (Nos. 00-511, 00-555, 00-587, 00-590 & 00-602) (an "assets 'forward-looking' cost (also known as its 'replacement' or 'economic cost')," must be distinguished from "the cost of duplicating the asset in every physical particular (sometimes called an item's 'reproduction' or 'replication' cost")).

SWBT responds that its cost models are not based *entirely* on reproduction cost and that they include many replacement cost assumptions. *See, e.g.*, Smith Reply Aff. at ¶¶ 35-39. AT&T has never claimed otherwise *See* AT&T Comments at 14. But compliance with the TELRIC rules in *some* respects obviously cannot cure other admitted violations of those rules. TELRIC requires an approach that replaces a BOC's existing technologies, equipment and architectures *whenever* more efficient replacements are available; not a "hybrid" approach that makes some correct replacement assumptions but, in other important respects, blindly assumes reproduction of the existing architectures, equipment and technologies.[12]

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insufficient reproduce even SWBT's Texas cost studies. However, review of the two Texas studies does reveal that the inputs used in Texas produced switch local usage costs that are between 8 and 17 percentage points lower than those used by SWBT for Missouri, which again confirms that SWBT's Missouri switch usage rates are inflated.

[12] SWBT's statement that the alternative cost model submitted by AT&T in the Missouri proceedings was based upon a "scorched earth" approach (Smith Reply Aff. ¶ 18) – *i.e.* that it fails to take the location of existing wire centers as given – is false (as well as irrelevant). *See* Model Description, Hatfield Model Version 2.2., Release 2, September 4, 1996, *AT&T Communications Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Southwestern Bell Telephone Company*, Case No. TO-97-40, at 26 (filed September 16, 1996) (explaining that the Hatfield Model uses "existing tandem and end office wire center locations" for computing UNE costs); *see also* Direct Testimony of Robert P. Flappan, Case No. TO-97-40, at 9 (filed September 16, 1996) ("the Hatfield Model takes the incumbent LEC's existing wire center locations as a given").

Depreciation. SWBT's depreciation argument boils down to this: (1) economic depreciation should properly reflect expected obsolescence, and not just physical deterioration, (2) the Commission-approved depreciation lives, which the Missouri PSC rejected, do not, and (3) the SWBT proposals, upon which the Missouri depreciation lives were based, do. The latter two statements are plainly false. As the Commission recently explained, its depreciation lives – which most states have used in establishing UNE rates – fully and properly account for obsolescence and are therefore appropriate for use in estimating the forward-looking costs of UNEs.[13] *See* Tenth Report and Order, *Federal-State Joint Board on Universal Service*, CC Docket Nos. 96-45, 97-160, ¶ 426 (1999) ("*Inputs Order*") ("Commission-authorized depreciation lives are not only estimates of the physical lives of assets, but also reflect the impact of technological obsolescence and forecasts of equipment replacement"); Memorandum Opinion and Order in ASD 98-91, *1998 Biennial Regulatory Review – Review of Depreciation Requirements for Incumbent Local Exchange Carriers, Unites States Telephone Association's Petition for Forbearance from Depreciation Regulation of Price Cap Local Exchange Carriers*, ¶ 17 (released December 30, 1999) ("*Depreciation Order*") ¶ 33 ("twenty-four states' commissions have required incumbent LECs to use FCC-prescribed projection lives. . . . We are concerned that forbearance form depreciation regulation by the Commission might deprive state regulatory commissions of [the ability to rely on those factors]"); *see also Kansas/Oklahoma 271 Order*¶ 76 ("it would be reasonable for a state to follow the depreciation rates the Commission has set for regulation of SWBT's interstate services").

The record with respect to SWBT's depreciation proposals is somewhat murkier. Based on SWBT's December 1996 testimony that its Missouri proposals were "consistent with" its financial accounting lives, AT&T had believed that SWBT's proposals were lifted from its accounting statements.[14] As GTE has explained, financial accounting lives are governed by the Generally Accepted Accounting Principle ("GAAP") of "conservatism" which "prefers the *understatement* . . . of net income and net assets where any potential problems exist."[15] Thus, it is not surprising either that financial depreciation lives often differ from those approved by the Commission for regulatory purposes by as much as 100 percent, *see* Baranowski Decl., Table 1, or that the Commission has elsewhere expressly rejected the use of financial accounting lives for regulatory purposes. *See Depreciation Order* ¶ 17 (rejecting the use of financial accounting lives

[13] Also SWBT's use of short depreciation lives is particularly inconsistent with its use of embedded fill factors and maintenance costs. For example, if SWBT's loop assets depreciate faster on a forward-looking basis than they have in the past, then SWBT embedded fill factors are too low to account for the fact that its loops will need to be replaced sooner than in the past. Likewise, if SWBT's assets depreciate faster on a forward-looking basis, SWBT's embedded maintenance factors will be too high because they will assume that maintenance is required for a longer time period than those assets are assumed to last.

[14] See Affidavit of John P. Lube, AT&T Communications of the Southwest, Inc.'s Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish Interconnection Agreement with Southwestern Bell Telephone Company, Case Nos. TO-97-40, Too-97-67, ¶ 7 (filed December 19, 1996).

[15] *See* Comments of GTE and Its Affiliated Domestic Telephone Operations Companies, *Prescription Simplification*, FCC 93-452, at 14 (March 10, 1993).

and pointing that other regulatory bodies "have statutory duties that differ from the requirements imposed on [the Commission] by the Act"). Although SWBT is quick in its reply comments to embrace the Commission's recent statement that the use of financial accounting lives is not *necessarily* a violation of TELRIC, *see Kansas/Oklahoma Order* ¶ 76, SWBT is careful to avoid any explanation of how it did, in fact, generate its Missouri proposals. *See* Smith Reply Aff. at ¶ 71 ("Mr. Baranowski *contends* that" SWBT used accounting lives). Upon further investigation, it now appears that that SWBT's proposals were based upon nothing more than "black box" subject matter "expert" opinions, (a handful of which were later arbitrarily adjusted by the Missouri PSC Staff based on "benchmarking" considerations). *See* Staff Report at 94-114; Lube Rebuttal Aff. at 18-20 (relevant pages attached). Accordingly, there is no basis for any finding that the SWBT proposals properly account for obsolescence – indeed, there is no basis even for a description of how SWBT's proposals were determined.

SWBT's general statements that UNE competition and technological innovation threaten to speed the rate of obsolescence of the modeled network are both wrong and irrelevant. Only facilities-based competition, not UNE-based competition, could increase the risk of obsolescence of SWBT's facilities; indeed, if anything UNE-based competition should serve to *decrease* such risk by ensuring that SWBT's network is used (and by reducing incentives for SWBT to replace or update old or outdated plant in order to attract new customers) even in the face of competition.[16] And, as SWBT has itself recognized, recent technological advances have tended to increase, not decrease the useful lives of existing plant. *See, e.g.*, Mark Emery & Beth Gage, *The Evolution of xDSL-Based Services*, Technological Paper for AG Communications Systems (2001) ("adjunct or integrated DLC support for xDSL and better loop qualification procedures will extend the life of the copper plant almost indefinitely").[17] In any event, as the Commission has recognized, its prescribed depreciation lives already account for obsolescence. *See Depreciation Order* ¶ 61, n.167 ("Commission-authorized depreciation lives are not only estimates of the physical lives of assets, but also reflect the impact of technological obsolescence and forecasts of equipment replacement"); *see also See* Third Report and Order, *FCC Simplification of the Depreciation Prescription Process*, CC Docket No. 92-296 FCC 95-181, ¶ 11 (released May 4, 1995) (Commission's lives are based upon "statistical studies [that] required detailed analyses of each carrier's plant retirement pattern, the carriers' plans, and the current technological developments and trends").[18]

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[16] The relevant risk for computing an incumbent LEC's depreciation rates is the risk incurred in the *wholesale* business of supplying UNEs, not the retail business of providing local services to end users. *See Local Competition Order* ¶ 702.

[17] Available at http://www.agcs.com/supportv2/techpapers/xdslev.htm.

[18] SWBT's claim that AT&T made "an egregious misrepresentation," Smith Decl. ¶ 70, in failing to rely on the AT&T depreciation lives cited by the Missouri PSC staff is particularly disingenuous. As SWBT is aware, the AT&T lives cited by staff were prescribed by the FCC for AT&T's long distance plant in 1995 (FCC 95-32, released January 31, 1995). Since AT&T had no local loops or local switches at that time, these lives were properly excluded by Mr. Baranowski. As the Commission explicitly recognized, "the underlying considerations that go into estimating the basic factors are sufficiently different for [LECs and IXCs] that they should be considered

correcting for SWBT's conceded mismatch, results in a common cost factor of about 8% – less than half the figure used to set SWBT's Missouri rates. And the recently released 2000 ARMIS data shows that even that figure is too high to satisfy forward-looking TELRIC standards – notwithstanding its continuing local dominance, SWBT's common cost factor using this 2000 data is only 6.8% (chart attached).[21]

ACES Model. AT&T demonstrated that SWBT's "ACES Model" violates TELRIC principles by incorporating embedded cost factors. *See* Baranowski Decl. ¶¶ 26-28. SWBT concedes that its ACES Model includes factors that are based on "historical information" but claims to have made adjustments to those factors to make them forward-looking." Smith Decl. ¶ 82. But the adjustments described by SWBT are entirely unresponsive to TELRIC issues raised by AT&T and DOJ.

In particular, AT&T has explained that SWBT's ACES Model relies on power and telecommunications engineering factors that are based on SWBT's embedded costs. In reply, SWBT claims to have addressed that problem by transforming those embedded cost factors into forward-looking costs by multiplying those factors by a ratio of current costs to booked costs. *See* Smith Decl. ¶ 82. But this process does not account for the fact that SWBT's power and telecommunications engineering factors account for tasks that should not have been included its power and telecommunications engineering factors in the first place. For instance, SWBT's power and engineering factors include tasks such as retrofitting and modifying SWBT's embedded plant to accommodate new equipment, as well as the removal of obsolete equipment – tasks that are not required in a forward-looking network. See Baranowski Decl. ¶ 27. Merely reducing these values with a forward-looking ratio cannot correct this error – in a truly forward-looking study there would be *no* such costs.

B. Loop-Specific TELRIC Violations.

Fill Factors. SWBT concedes that its rates reflect "*actual* fill factors for distribution cable based on *current levels of total capacity*," Smith Reply Decl. ¶ 44 (emphasis added), rather than a forward-looking estimate of efficient levels of spare capacity as required by TELRIC. SWBT recognizes that the resulting distribution fill factor of 40 percent "seems low" but speculates that "some areas may experience unexpectedly large demand increases." Smith Reply Decl. ¶ 51. But, as the Commission has recognized, leaving nearly two-thirds of distribution plant idle is neither efficient nor forward-looking; rather, an efficient provider would design its distribution network to be filled at 50-75 percent of capacity. *See Inputs Order* ¶ 188 n.392. *See also Kansas/Oklahoma 271 Order* ¶ 80 (pointing out that "the Kansas Commission adopted a 53 percent fill factor for distribution cable, and the New York Public Service

[21] SWBT's maintenance factors are also inflated by its use of embedded costs. SWBT's factor development process results in the inclusion of the costs of SWBT's own customer non-recurring activities (*e.g.*, new installations) being improperly included in the TELRIC recurring rates. For this reason, the Texas commission and the advisory consultant in the Oklahoma proceeding required reductions in SWBT's maintenance factors. And the Kansas Commission eliminated approximately 38% of SWBT's "M-coded" maintenance costs (excluding switch RTU fees). No adjustment was made to the Missouri cost studies to address SWBT's inflated maintenance factors.

Commission adopted a 50 percent fill factor); Baranowski Decl. ¶ 32 (noting that the "mid-point of the distribution fill factors adopted in Massachusetts is 52.5%"); *Inputs Order* ¶ 195 ("The administrative fill factors are determined per engineering standards and density zone conditions. These factors are independent of an individual company's experience and measured effective fill factors. The administrative fill factors would be the same for every efficient competitive firm").

SWBT complains that the Commission should not rely on its Synthesis Model fill factor findings because the Commission ruled in the *Kansas/Oklahoma 271 Order* that the Synthesis Model should not be used to estimate UNE rates. *See* Smith Decl. ¶ 6. But in that very same order the Commission recognized that the appropriateness of measuring UNE fill factors against its Synthesis Model findings. *See Kansas/Oklahoma 271 Order* ¶ 80. That is because, regardless of any other incongruities between the Synthesis Model and the Commission's TELRIC rules, the Commission employed the same forward-looking approach to estimating fill factors in its universal service proceedings that it has required in the UNE context. SWBT nonetheless urges the Commission to disregard its Synthesis Model fill findings – the product of nearly two years of intensive workshops and litigated proceedings to which SWBT was a party – because the Commission "effectively approved" a 40 percent fill factor "in granting Southwestern Bell's section 271 application in Texas. SWBT Reply at 13. The Commission did no such thing. SWBT's Texas distribution fill factors were not even litigated in the section 271 proceeding and thus the Commission had no occasion to approve them, implicitly or otherwise.[22]

Conduit Sharing. SWBT provides no justification for its extremely low conduit sharing assumption of 0.09 percent. A proper forward-looking approach would, at a minimum, account for the fact that new local telephone entrants in Missouri would seek out opportunities to share both existing and planned underground structure (most of which is conduit in Missouri) as a means of controlling costs. *See* Baranowski Reply Decl. ¶ 11. The Commission's Synthesis Model, for instance, assumes an average 40 percent sharing rate for underground structure investment in Missouri. *See id.* SWBT's near-zero sharing assumption cannot be considered to be anywhere near the "range of reasonableness."

Digital Loop Carrier ("DLC"). As SWBT has explained, "one of the key factors underlying DLC costs is whether the system is integrated with the serving end office." Smith Decl. at A-18. An integrated DLC ("IDLC") is more efficient and less costly because it is connected directly to the switching system so that digital signals from customers do not have to be converted back to analog signals. *See, e.g.*, Smith Decl. at A-18 (using integrated DLCs

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[22] The Commission has repeatedly stated that it generally will consider those issues raised by the parties to a Section 271 proceeding. *See, e.g. Mass. 271 Order* ¶ 15 (the Commission will "focus attention on the section 271 requirements commenting parties address most extensively, while streamlining the discussion of the other less controversial requirements"). Any suggestion that the Commission has "approved" every input to every cost study used to determine every rate in a state in which the BOC receives 271 authority would essentially require parties to a section 271 proceeding to litigate every input for every element.

"saves from having to have central office terminating equipment for the DLC system"). Yet SWBT's rates reflect an assumed network with IDLC employed a mere 25 percent of the time.

Incredibly, SWBT claims on reply that the DLC ratio should have been set at *zero* because "[u]nbundled loops cannot be extracted or 'groomed' from an IDLC system without significant additional expense." Smith Decl. ¶ 61. SWBT provides no cost study support for any such assumption, much less the data and electronic cost studies that would be necessary to test the assertion that these unidentified unbundling costs would exceed the enormous central office savings associated with IDLC. Moreover, SWBT is simply wrong in asserting that unbundled loops cannot be extracted from efficient IDLC systems. Most fundamentally, no such "extraction" is even necessary in the UNE-P scenario through which almost all UNE-based customers are served. But it is by now well established that loops can, in any event, quite easily be extracted from modern IDLC systems at little or no additional cost.[23]

Dark Fiber. SWBT does not dispute that its loop rates are inflated with dark fiber costs. SWBT justifies this mismatch on the grounds that it failed to include those costs in its dark fiber rates. *See* SWBT Reply at 15. That might provide SWBT a justification for seeking to increase its dark fiber rates, but it certainly cannot justify misallocating dark fiber costs to loop rates. In the alternative, SWBT argues that the dark fiber costs belong in loop rates because CLECs might not purchase its dark fiber separately. *See* Smith Reply Aff. ¶ 65. On that "logic," if CLECs are only buying loops, then switching and transport costs ought to go into loop rates as well. Fortunately, that approach is expressly forbidden by the Commission's TELRIC rules. 47 C.F.R. 51.505(d)(4) (expressly disallowing recovery of costs to "subsidize . . . services . . . other than the element for which a rate is being established"); *see also Local Competition Order* ¶¶ 682 (allowing incumbent LECs to "recover the forward-looking costs directly attributable to the specified element. . . . Directly attributable forward-looking costs include the incremental cost of facilities and operations that are *dedicated to that element*") (emphasis added).

Cable Tapering. SWBT concedes that its cost studies make no express provision for the loop tapering that any efficient provider would employ. *See* SWBT Reply at 14; MPSC Staff Report at 18 ("a feeder segment may originate as a very large cable and taper as the cable terminates to multiple [feeder distribution interfaces]"). Failure to include tapering feeder plant in a cost study "increase[s] the cost of the feeder segment because it precludes the use of large size cable at the beginning of the feeder segment and fails to recognize the tapering of the feeder cable." *Id.*

SWBT claims that by basing cable costs on its existing cable inventory, rather than on efficiently designed forward-looking cable placement, it has compensated for this error by understating distribution cable costs while overstating feeder cable costs. *See* Smith Reply

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[23] *See, e.g., New York Re-Examination Decision at* 92 ("CLECs argue credibly that [integrated DLC] technology should be able to obviate UDLC [*i.e.*, non-integrated DLC] in the near future if it cannot already do so, and that a properly forward-looking TELRIC analysis should take into account those developments"). Some IDLC systems may accomplish loop extraction at the DS1 level, but no CLEC would incur the expense of collocation at an ILEC central office it if did not expect to serve at least 24 customers from major DLC systems.

Decl. ¶ 43. As noted above, that explanation merely confirms that SWBT violated TELRIC by employing unlawful reproduction cost assumptions. In any event, SWBT has provided no evidence that the two claimed errors exactly cancel each other out or, indeed, that its cable cost assumptions caused any understatement at all. Again, SWBT's burden is to *prove* that its rates are TELRIC-compliant not merely to declare that is so. If SWBT wanted the Commission to rely upon the intricacies of its cost models, it should have provided the Commission and commenting parties with full electronic access to those models. It chose not to do so, and its unsupported allegations about the rate impacts of particular assumptions in those cost studies must therefore be disregarded.[24]

C. Switch-Specific TELRIC Violations.

Switch Discounts. SWBT's switch usage rates in Missouri are among the highest in its five state region even though Missouri costs are among the lowest. *See* Baranowski Decl., Table 2. These switch usage rate/cost disparities reflect SWBT's use of switch discounts that are based upon "attributable growth" – *i.e.*, the volume and type of switches needed to expand SWBT's *existing* network – rather than the switch discounts that an efficient new provider would obtain to build out an efficiently sized network. *See* Staff Report at 32; *Local Competition Order* ¶ 684.

SWBT argues that basing switching costs on the costs of purchasing new switches at the best available discount would result in a "flash-cut" of switch investment "at a single point in time" and is therefore not an appropriate measure of switch discounts. Smith Reply Decl. ¶ 24. To the contrary, such a "flash cut" of switch investment is precisely what the Commission's TELRIC methodology contemplates. As the Commission has stated, the rates for network elements should be "based on costs that assume that wire centers will be in place at the incumbent LEC's current wire center locations, but . . . the *reconstructed* local network will employ the most efficient technology for reasonably foreseeable capacity requirements." *Local Competition Order* ¶ 685.[25] And it is for precisely these reasons that the Commission specifically rejected incumbent LEC arguments that "costs associated with upgrading switches" should be included in its Synthesis Model and instead held that forward-looking switching costs

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[24] Moreover, what is available in the record strongly suggests that SWBT's newly minted claim is baseless. As an initial matter, when asked by the Missouri Staff to quantify and address the cable tapering problem, SWBT feigned ignorance, claiming that it did not have any data related to the cable tapering and could not incorporate tapering into its loop cost study. *See* Staff Report at 18. The few cost study files that SWBT has recently provided belie any notion that the feeder/distribution allocation SWBT now claims solves the problem. Even the largest cable pair in SWBT's cable cost study documentation is much smaller than 4200 pairs. SWBT therefore cannot claim that its cost studies taper 4200 pair cable feeder down to 600 pair cable feeder at the FDI. *See* Smith Decl. ¶ 43. Moreover, SWBT's cost study documentation shows that a single sized cable is assigned to each FDI, further refuting SWBT's claims that its cost studies account for tapering of different sized cable pairs at the FDI.

[25] *See also Bell Atlantic-Delaware, Inc. v. McMahon*, 80 F. Supp. at 238 (agreeing that the "long-run" requirement of the TELRIC standard "says rip every switch out. All of them. . . . Every switch in the network, rip them out. Leave . . . wire center locations where they are. And build the network that you would build today to serve demand").

should be determined using newly purchased switches efficiently sized to meet existing demand. *Inputs Order* ¶ 315.[26]

SWBT's explanation for its failure to apply switch discounts to engineering and installation – that the particular SWBT contracts that it elected to provide to the Missouri PSC do not provide discounts for engineering and installation – is equally inconsistent with the TELRIC rules. The question is not whether those particular SWBT contracts include such discounts but whether an efficient provider reconstructing a network today could and would demand them. The Texas switch usage cost studies recently produced by SWBT show that the Texas Staff ordered the switch discounts to be applied to materials, installation and engineering.[27] *See also* Arbitration Award, Public Utilities Commission of Texas, Docket Nos. 16189, 16196, 16226, 16285, 16290, 16455, 17065, 17579, 17587, 17781, at Appendix A, page 1, Issues 2-7 (December 17, 1997).

Hardware factor. SWBT's response to the Missouri PSC's concern that SWBT may have double-counted port costs through its hardware factor is again simply to declare, without the slightest explanation or support, that its cost studies handled the matter correctly. *See* Smith Decl. ¶¶ 30-34. If the explanation was as straightforward as SWBT now makes it out to be, SWBT presumably would have explained the matter to the MPSC Staff's satisfaction. It did not do so, and its unsupported assertion on reply cannot be credited, particularly in light of SWBT's admission in the Kansas rate proceedings that it *did* double recover such costs. *See* Order Setting Inputs for Cost Studies, *Joint Application of Sprint et al. to Open a Generic Proceeding on SWBT's Rates for Interconnection, Unbundled Elements, Transport, and Termination, and Resale,* Docket No. 97-SCCC-149-GIT, at A-71 (pointing out that SWBT concedes that it double recovers for universal tone receivers, once through the hardware factor and once through the SCIS model).

D. Non-Recurring Charges.

SWBT does not deny that its Missouri NRCs greatly exceed its NRCs in other states, including even Kansas and Oklahoma, where SWBT's NRCs are far too high and are the subject of a pending appeal. As the Kansas Corporation Commission has recognized, non-recurring charges "should not be expected to vary significantly across SWBT's jurisdictions because the activities associated with the NRCs are expected to be very similar across these

[26] In particular, the Commission has found that "[s]witches, augmented by upgrades, may provide carriers the ability to provide supported services, but do so at greater costs. Therefore, such augmented switches *do not constitute cost-effective forward-looking technology.*" *Inputs Order* ¶ 317 (emphasis added).

[27] Further, SWBT's attempt to justify its Missouri switching rates by comparing them to those proposed by AT&T in Texas confirms that SWBT's Missouri UNE switch rates are excessive. *See* Smith Decl. ¶ 23. The UNE switch rates relied on by SWBT in this proceeding are about 50 percent higher than those proposed by AT&T in Texas. *See id.*

jurisdictions."[28] SWBT notes that state commissions have required it to make state-specific adjustments to its non-recurring rates so that one should expect there to be *some* difference in non-recurring rates between states. *See* Smith Reply Decl. ¶¶ 101-102. But that can hardly explain differences of as much as several hundred percent. *See, e.g.*, AT&T Reply Comments at 13. Further, the "state-specific" adjustments to which SWBT refers did not reflect any cost differences but merely varying state responses to SWBT's uniformly bloated NRC proposals based on unlawful manual processing.

E. Interim Rates.

Fully *half* of SWBT's Missouri UNE rates are interim rates. *See, e.g.*, AT&T Reply Comments at 25. That is far more than in any other state that has obtained section 271 approval. Further, many of these interim rates were those proposed by SWBT for the first time in its state section 271 application and were simply rubber-stamped by the Missouri PSC with no review to determine whether they were even close to TELRIC-based rates. *See id.* SWBT's only response is to point out that many of the interim rates have been set at zero. But that is entirely beside the point – even if *all* of the interim rates were set at zero, the reality is that the Missouri PSC could establish competition-foreclosing permanent rates that bear no relation to costs.[29] It is simply impossible for competitive LECs to develop and implement market entry plans with such uncertainty as to what rates will ultimately prevail for so many critical network elements, and, contrary to SWBT's claim no Commission precedent does – or could – justify granting a section 271 application in these extraordinary circumstances.

For the reasons stated above, and in AT&T's prior comments in this proceedings, SWBT's Missouri Application should be denied.

Sincerely,

David L. Lawson

cc: D. Atwood
G. Reynolds
J. Jackson
R. Lerner
T. Navin
G. Remondino

[28] *See* Order on Reconsideration, *Joint Application of Sprint et al. for the Commission to Open a Generic Proceeding on Southwestern Bell Telephone Company's Rates for Interconnection, Unbundled Elements, Transport and Termination and Resale*, Docket No. 97-SCCC-149-GIT, at 26 (September 1, 1999).

[29] In all events, none of the zero interim rates would affect SWBT's excessive UNE-Platform rates.

ORIGINAL

Frank S. Simone
Government Affairs Director

Suite 1000
1120 20th Street, N.W.
Washington, DC 20036
202 457-2321
FAX 202 457-2545
EMAIL fsimone@att.com

April 20, 2001

Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
445 Twelfth Street, S. W. -- Room TWB-204
Washington, D. C. 20554

Re: *Ex Parte*, CC Docket No. 98-147, Deployment of Wireline Services Offering Advanced Telecommunications Capability; CC Docket No. 96-98, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996

Dear Ms. Roman Salas:

On Friday, April 20, 2001, the attached letter was delivered to William A. Kehoe III of the Common Carrier Bureau's Policy and Program Planning Division. In this letter, AT&T Corp. expands on its previous discussion of several points at issue in the above captioned proceedings concerning the D.C. Circuit's remand in *GTE Service Corp. v. FCC*, 205 F.3d 417 (D.C. Cir. 2000). Please include a copy of this submission in the record of the proceedings noted above.

Two copies of this Notice are being submitted to the Secretary of the FCC in accordance with Section 1.1206 of the Commission's rules.

Sincerely,

ATTACHMENT

cc: M. Carey
K. Cook
A. Goldberger
D. Johnson
W. Kehoe III
B. Olsen
G. Reynolds

Teresa Marrero
Senior Attorney

Suite 1000
1120 20th Street, N.W.
Washington, DC 20036
202 457-3810

April 20, 2001

Ex Parte Presentation

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, S.W. – Room
Washington, D.C.

Re: Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket Nos. 98-147 and 96-98

Dear Ms. Salas:

In this letter, AT&T Corp. ("AT&T") expands on its previous discussion of several points at issue in the above-captioned proceedings concerning the D.C. Circuit's remand in *GTE Service Corp.* v. *FCC*, 205 F.3d 417 (D.C. Cir. 2000). Specifically, AT&T addresses whether the Commission may require incumbent local exchange carriers ("LECs") to permit competitive LECs to collocate "multi-function" equipment and cross-connects pursuant to 47 U.S.C. §§ 251(c)(6) and 224.

Multi-Function Equipment. The Commission has ample authority to require incumbent LECs to permit physical collocation of "multi-function" equipment – *i.e.*, equipment that combines functions that are indisputably "necessary for interconnection or access to unbundled network elements" under § 251(c)(6) with other functions that, standing alone, might not satisfy the "necessary" test.

First, the D.C. Circuit did *not* hold that the statute precludes collocation of "multi-function" equipment. Rather, the Court took issue only with the unlimited breadth of the Commission's prior collocation order. Specifically, the Court found merely that "the literal terms of the Collocation Order seem to embrace *any and all* equipment that is otherwise necessary without regard to whether such equipment unnecessarily 'includes a switching functionality, provides enhanced service capabilities, or offers other functionalities'." *GTE Serv. Corp.*, 205 F.3d at 424 (emphasis added). The Court was concerned that the Collocation Order permitted the collocation of any integrated

equipment that "lowers costs and increases the services [CLECs] can offer their customers, which was precisely the "kind of rationale, based on presumed cost savings," that the Supreme Court rejected in *Iowa Utilities Board*. *Id.* (citing *AT&T Corp.* v. *Iowa Utils. Bd.*, 530 U.S. 366, 389-90 (1999)). The Court expressly left open the possibility that the Commission could re-adopt a narrower version of the multi-function equipment rule on remand with a "better explanation." *Id.*

The record developed on remand provides ample grounds for such a rule. To begin with, with respect to most "multi-function" equipment, each of the integrated functionalities independently satisfies the "necessary" test. For example, the most commonly cited example of "multi-function" equipment is the integration of transmission and multiplexing functions with packet switching functions. No party disputes that transmission and multiplexing functions are "necessary," and AT&T and others have made extensive showings that packet switch functions are also "necessary." *See, e.g.*, AT&T Comments at 27-30 & Culmone/Holmgren Declaration ¶¶ 31-36; AT&T Reply Comments at 30-33.

Even if that were not the case, the different functionalities of multi-function equipment are often not practicably severable. For example, as AT&T has previously shown, statistical multiplexing – which no one disputes is "necessary" under § 251(c)(6) – is of no practical use unless it is integrated with packet switching functionality in the same equipment. *E.g.*, AT&T Comments at 29. Therefore, an ILEC's refusal to permit collocation of equipment containing packet switching functionality would effectively deny CLECs the ability to collocate the indisputably "necessary" statistical multiplexing functionality. No incumbent LEC has disputed AT&T's factual showing on that point. Under those circumstances, even if packet switching functionality alone would not satisfy the "necessary" test, the multi-function equipment containing packet switching would. *Cf. GTE Serv. Corp.*, 205 F.3d at 424 (vacating FCC collocation rule only to the extent that it required collocation of multi-function equipment that "unnecessarily" includes a switching function).

In any event, single function equipment is increasingly unavailable. Indeed, the comments filed by the manufacturing companies demonstrate that advances in integration and processing capability are driving manufacturers to produce multi-function equipment. For example, as Cisco explained, "advances in computer processors and miniaturization have allowed manufacturers to design and build increasingly intelligent boxes that perform more functions but take up no more space and consume less power than did their less advanced predecessors." Cisco at 7.[1] Tachion has created a product "that combines switching, routing, transport, digital access cross connect systems, signaling, and service creation functionality in a single standard central office rack." Tachion Comments at 2; *see also* Supra Telcom at 14-15 ("the current state-of-the-art in class 5 switching is putting even more capabilities into Class 5 switching platforms,

[1] *See also* Nortel at 5 ("Single-function (interconnection only) products are unlikely to be physically smaller or consume less power than equipment that includes additional functionality . . . "); Qwest at 11 ("[T]here is no reason to conclude that newer equipment with multiple functions will require more space than older, single-function equipment . . .").

adding voice over, varying broadband transports, remote access, xDSL, ATM and even video services to the traditional class 5 platform, in far less space than the Lucent 5ESS takes")).

Because single-use equipment is increasingly unavailable, the inability to collocate multi-function equipment would, as a practical matter, make interconnection and access to UNEs operationally infeasible. Indeed, Verizon effectively conceded this point when it argued that, if the Commission prohibits collocation of multi-function equipment, manufacturers would step into the void by designing and offering specially designed single-use equipment for CLECs. Verizon Comments at 6-7. Equipment manufacturers expressly refuted that claim. *See, e.g.*, Nortel Comments at 5 (prohibiting multi-function equipment would impose additional costs on manufacturers because it would "likely require increased research and development efforts because of the loss of potential economies of scope in order to design additional [single-use] products or product variants"); Cisco Comments at 10-11. And in all events, the Commission should not be in the business of creating, through arbitrary regulations, artificial demand for single function equipment that does not exist or speculating that such equipment would become available (at costs that would support sustainable entry) if collocation of multi-function equipment were prohibited.

Thus, the only open question is whether ILECs could, consistent with the Act, require CLECs to disable "non-necessary" functionalities within integrated equipment. The answer is plainly no. Forcing CLECs to disable integrated functions would be a blatantly unjust, unreasonable, and discriminatory term and condition of collocation, in violation of § 251(c)(6), for two principal reasons.

First, disabling functions within integrated equipment imposes unreasonable costs on CLECs. The different functions within multi-function equipment are seamlessly integrated within the circuitry of the equipment. A CLEC cannot disable particular functions simply by flipping an "off" switch; rather, the CLEC must literally design modifications to the equipment's software – a process that adds considerable cost and potentially degrades the performance of the equipment. *See, e.g.*, AT&T Comments at 24; Connectiv Comments at 8-9. Therefore, any condition that some functions must be disabled would be unjust and unreasonable under the statute, especially in light of the fact that multi-function equipment usually imposes no additional costs or space demands on the incumbent. See, e.g., Cisco at 7; Nortel at 5; Tachion at 2.

Second, such a condition would also be discriminatory. It is well settled that the statutory term "nondiscriminatory" means nondiscriminatory as between the incumbent and the CLEC. *See, e.g., Local Competition Order* ¶¶ 218 ("[w]e believe that the term 'nondiscriminatory,' *as used throughout section 251*, applies to the terms and conditions an incumbent LECs imposes on third parties as well as itself" (emphasis added)). Incumbent LECs do not disable such functions in their own networks, and therefore requiring CLECs to do so would be a discriminatory term and condition.

Thus, equipment meets the "necessary" test where CLECs could make use of an obviously "necessary" capability of a piece of multi-functional equipment only by

also using another capability that might not independently (*i.e.*, as a piece of stand alone equipment) appear "necessary for interconnection or access to network elements. This standard is reasonable, and not all-encompassing. Application of the standard would preclude collocation of a wide range of equipment, including DA functionality, number translation (e.g., 800# data base, LNP) functionality, LIDB data bases, Message rating equipment, OS functionality (i.e., mechanized collect calling, credit card, validation data bases, etc.), Network Access Servers for the public Internet, access authentication servers for public internet, CNAM data bases, Voice Mail Platforms, SS7 signal control points, and Announcement Adjuncts.

Cross-Connects. The Commission also has ample authority to require incumbent LECs to permit CLEC cross-connects within the central office, for several reasons.

First, the Court did not hold that the statute precluded any rule requiring incumbent LECs to permit cross-connects. Rather, the Court found that the cross-connect requirement illustrated a "problem" with the Commission's overly broad interpretation of the statutory term "necessary." Specifically, the Court concluded that the cross-connect requirement had no "apparent" basis in the statute, and that the Commission had not "even attempt[ed] to show that cross-connects are in any sense 'necessary for interconnection or access to unbundled network elements.'" *GTE Serv. Corp.*, 205 F.3d at 423. The Court faulted the Commission for being "almost cavalier in suggesting that cross-connects are efficient and therefore justified § 251(c)(6)." *Id.* In short, the Commission's previous order had justified the cross-connect requirement solely on grounds of efficiency, rather than explaining how it comported with the terms of the statute.

On remand, the Commission should now explain that a cross-connect requirement does in fact comport with the statute, in several respects. First, cross-connects are unquestionably "necessary" for "access to unbundled network elements" in the context of line splitting. Line splitting involves two CLECs who share the same unbundled loop, one providing voice services and the other providing data services. The Commission has made clear that "access" to unbundled loops includes "permit[ting] competing carriers to engage in line splitting over the [unbundled loop] where the competing carrier purchases the entire loop and provides its own splitter." *Texas 271 Order* ¶ 325. Without the ability to establish cross-connects in the central office, CLECs would be forced to extend copper lines out of the central office and connect elsewhere. Such a practice would be prohibitively expensive, and would effectively eliminate the ability to offer data services over the loop. *See* AT&T Comments at 21-22; AT&T Reply Comments at 36-37. Thus, absent cross-connects in the central office, line splitting – and thus full "access to unbundled network elements" – would be infeasible.

CLEC-to-CLEC cross connects also are necessary to permit CLECs to choose a LEC other than the ILEC to provide transport services. Indeed, the Commission has previously found that, because CLECs "connect to the collocation space via high-capacity lines," "the most efficient means of [?] interconnecting with each other" may be cross-connection of "their respective collocation spaces on the LEC premises." *Local Competition Order*, 11 FCC Rcd at 15801, ¶ 592. If, however, CLECs were prohibited

from cross-connecting at ILEC central office facilities, they would be forced to enter into prohibitively expensive arrangements to "interconnect collocated facilities by routing transmission facilities outside of the LECs' premises." *Local Competition Order*, 11 FCC Rcd at 15801, ¶ 594. Indeed, one promising source of facilities-based competition is the potential for competitive LECs to compete with the incumbents by interconnecting with third-party facilites-based providers of fiber capacity, but incumbents typically refuse to permit such interconnection within the central office, effectively rendering such interconnection infeasible in most instances.

SBC's most recent *ex parte* stating that SBC will provide cross connections at access rates is irrelevant. See Letter from Jay Bennett (SBC) to Magalie Roman Salas, dated April 12, 2001. Section 251(c)(6) clearly obligates the incumbents to provide cross-connects at cost-based rates, and the incumbents' "offer" to provide cross-connects under the access regime cannot override that obligation. Moreover, provision of cross-connects under the access regime gives the ILEC full control over the terms and condition under which cross-connects will be provided. Even assuming that at the outset these terms and conditions were not onerous, the ILEC may change these terms and conditions at any time simply by modifying its access tariff. Provisioning cross-connects through access tariffs does not guarantee that they will be provided at cost-based rates because there is no TELRIC obligation imposed under the access service tariffs.

The Commission may also require incumbent LECs to permit cross-connects as a "just, reasonable and nondiscriminatory" term of collocation. Where, as here, the incumbent can easily accommodate cross-connects with virtually no disruption of the central office, it is clearly unreasonable for the incumbent to deny CLECs the ability to cross-connect in the central office as a term of collocation. Denying cross-connects would also be discriminatory, because otherwise only the incumbent would be able to connect to all other LECs within the central office. The Commission has recognized that the duty to permit collocation necessarily carries with it other ancillary rights that may entail occupation of the incumbent's property, such as an easement through the central office for CLEC workers to access their collocation cage. Cross-connects represent another such ancillary easement.[2]

In any event, Sections 251(b)(4) and 224 provide an independent basis for requiring incumbents to permit cross connects. The Commission has held that the plain language of Section 224(f)(1), which requires "non-discriminatory access to any pole, duct, conduit, or right-of-way owned or controlled" by a utility, "encompass[es] in-building facilities . . . that are owned or controlled by a utility." *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Ordering CC Docket No. 88-57, ¶ 80 (2000) (*"Building Access Order"*). The Commission has found that "'rights-of-way'

[2] As AT&T has previously explained, the statutory provision concerning just, reasonable, and nondiscriminatory terms and conditions defines the scope of the taking authorized by Congress no less that the provision concerning equipment necessary for interconnection and access to unbundled network elements. Letter from Teresa Marrero (AT&T) to Magalie Roman Salas (FCC), dated February 22, 2001.

within buildings means, at a minimum, *defined pathways* that are being used or have been specifically identified for use as part of a utility's transmission and distribution network." *Id.* ¶ 82 (emphasis added). To deploy a cross-connect, CLECs typically use well-defined and pre-existing cable racks, floor penetrations, and other "defined pathways" in the central office that are already part of the incumbent's "transmission and distribution network" and that easily fit within Section 224(f).

Sincerely,

Teresa Marrero